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In The

Supreme Court of the United States

October Term, 1998

ELOISE ANDERSON, Director, California Department of Social Services; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; PETE WILSON, Governor of the State of California; and CRAIG L. BROWN, Director, California Department of Finance,

Petitioners,

v.

BRENDA ROE and ANNA DOE, on behalf of themselves and all others similarly situated,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO RESPONDENTS' BRIEF ON THE MERITS

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REPLY TO RESPONDENTS' BRIEF ON THE MERITS

Petitioners, Eloise Anderson, Director, California Department of Social Services; the California Department of Social Services; the Honorable Pete Wilson, Governor of the State of California; and Craig L. Brown, Director, California Department of Finance (hereafter, "California")[1] reply to respondents' brief on the merits as follows:

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[1] Gray Davis is scheduled to take the oath of office as Governor of the State of California on January 4, 1999, and as such will be the successor in interest to Governor Pete Wilson, who was named in the original pleadings. Thus, before January 13, 1999, the date scheduled for oral argument in this matter, Mr. Davis will be automatically substituted as a party in place of Governor Wilson in the District Court proceedings pursuant to the provisions of Federal Rule of Civil Procedure 25(d) and in these proceedings pursuant to the provisions of Rule 35, subdivision (1) of the Rules of this Court.

Tim Gage is expected to be appointed the new Director of Finance by Governor-elect Davis. He will succeed Craig L. Brown as Director, California Department of Finance on January 4, 1999 and will be substituted as a party in place of Mr. Brown at that time.

Eloise Anderson is expected to resign her position as Director, California Department of Social Services, as of December 31, 1998. An acting director is expected to be appointed at that time, but no decision has yet been made as to who will be appointed.

ARGUMENT

I

CALIFORNIA'S STATUTE DOES NOT OPERATE AS A PENALTY ON MIGRATION. THEREFORE, IT SHOULD BE SUBJECTED ONLY TO A RATIONAL BASIS ANALYSIS

Unhappy with the welfare reform enacted both by the United States Congress through the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), 42 U.S.C. section 601, et seq., and by the California Legislature through California Welfare and Institutions Code section 11450.03 ("section 11450.03") respondents here ("plaintiffs") challenge California's statute on constitutional grounds.

The issue here is not whether California's statute represents good public policy[2]: The issue is, instead, the level of scrutiny by which the constitutionality of section 11450.03 is to be adjudicated. Plaintiffs argue that California's statute is not good public policy. However, such an argument is irrelevant. It does not address the issue presented here: i.e., whether California's statute should be subjected to only a rational basis review.

As stated by California on page 16 of its brief on the merits, the relevant questions are therefore whether section 11450.03 has the purpose of impeding travel as its

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[2] This is the issue addressed by many of the *amici* briefs supporting plaintiffs. To the extent those briefs focus on whetner or not section 11450.03 is good policy, they are of little or no assistance to this Court in resolving the question presented.

primary objective, whether the statute penalizes the exercise of the right to travel, and whether it actually deters travel. California's statute does none of the above.

As noted in California's brief on the merits, the primary objective of section 11450.03 is *not* to impede travel. As there is no purpose expressed in the statute itself, as plaintiffs' exhibits do not reflect applicable legislative history, as the principal effect of the statute is to conserve limited state resources, and as the statute was enacted in conjunction with a federally-approved welfare reform experiment, it is clear that the purpose of the statute is to conserve California's scarce financial resources for all of its citizens by instituting reform of California's welfare system.

On its face, the statute does not erect effective and purposeful barriers to insulate California from indigents in the form of either criminal penalties or complete denials of public assistance. There is nothing in the terms of section 11450.03 which would impede an indigent person from traveling to or settling in California. Thus, the words of the statute make clear that the primary purpose of the statute is *not* to impede travel.

Nor does the statute penalize travel. The statute does not deny welfare benefits outright, as was condemned in *Shapiro v. Thompson*, 394 U.S. 618 (1969)[3] and in *Memorial*

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[3] Plaintiffs attempt to distinguish the Connecticut and Pennsylvania statutes at issue in *Shapiro* from the California statute at issue here, by referring to this Court's reference to the "partial assistance" offered by Connecticut and Pennsylvania. *Shapiro*, at 635; Plaintiffs' Brief on the Merits at 26. Plaintiffs

Hospital v. Maricopa County, 415 U.S. 250 (1974). The statute does not create *permanent* distinctions based on the length of state residency as were struck down in *Zobel v. Williams*, 457 U.S. 55 (1982) (size of payments from oil revenues dependent upon years of residence in Alaska), *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985) (property tax exemptions based on state residence before a specific date), and *State Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986) (preferences for veterans based on length of state residency). The statute explicitly provides that persons subject to the statute receive *at all times* a constitutionally permissible amount of cash aid: either the maximum amount receivable in their prior state of residence, or (after one year of residency) the full amount of the California grant.[4]

Thus, it cannot be said that section 11450.03 penalizes the right to travel as persons subject to the statute are not deprived of the basic necessities of life. As noted above, the statute neither denies nor delays eligibility for cash aid welfare benefits; to the contrary, it provides for a constitutionally permissible amount of cash aid upon arrival in California, assuming all other conditions of

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point out a distinction without a difference. Unlike the California statute, the Connecticut and Pennsylvania statutes *denied eligibility* to newcomers, while offering limited, emergency assistance only. *Shapiro*, 623 n.2, 627 n.5.

[4] Plaintiffs reference the fact that newcomers from foreign countries are not impacted by section 11450.03. (Plaintiffs' Brief on the Merits, n.2.) The issue of immigrant eligibility for federal and state public benefits, including cash aid, is a federal, and not a state issue. It has been addressed by Congress in Title IV of PRWORA.

eligibility are met. The statute has no adverse impact on the receipt of Medicaid benefits or on any other welfare benefit offered by California. In fact, the operation of section 11450.03 increases the amount of Food Stamps issued to persons subject to the statute. Thus, because section 11450.03 temporarily impacts only *one* aspect of California's welfare benefits package and does not even temporarily reduce the amount of cash aid a newcomer was entitled to receive in the prior state of residence, it is *factually not correct* to argue that persons subject to the statute are deprived of the basic necessities of life.

The effect of section 11450.03 on travel is remote and incidental, at best.[5] California's statute neutralizes the level of cash aid available to recipients in California as a factor in a person's decision to move to California. By having no effect on eligibility for welfare, the statute imposes no penalty on interstate migration. Those impacted by the statute still receive a constitutionally permissible level of public assistance. As with all people contemplating a change in their state of residence, public assistance beneficiaries must make decisions on where to live based, in part, on how far their dollars will go in

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[5] Plaintiffs attempt to concoct a new doctrine of constitutional law under which statutes which treat newcomers "differently" from longer term residents are prohibited. (Plaintiffs' Brief on the Merits, at 14-15.) Such is not the case. Plaintiffs derive this attempt to formulate new law from this Court's opinion in *Zobel v. Williams*, 457 U.S. 55, 60 n.60. However, the statement in footnote 6 of *Zobel* is not an enunciation of such a doctrine, but instead merely a statement that when a statute distributes benefits unequally, an equal protection argument may be invoked.

their new home. With a state as large as California, newcomers to California may stretch their dollars depending on where they decide to settle within California.

Finally, section 11450.03 has not been shown to actually deter travel. Plaintiffs have not shown any person who was actually deterred from traveling to California because of the statute's enactment.[6]

All arguments of plaintiffs and their supporting *amici* relating to the high cost of living in California are irrelevant. As noted on page 19 of California's brief on the merits, it is constitutionally permissible for a state to set a benefit level below that state's standard of need. *Dandridge v. Williams*, 397 U.S. 471, 480, 483 (1970). The effect of doing so is a political decision vested in that state's legislature, and is not to be subjected to scrutiny by the judiciary. *Dandridge*, 397 U.S. at 482. Thus, the level of cash aid set by a state's legislature is in no way a guarantee of a certain standard of living. Even in the absence of implementation of section 11450.03, there is no guarantee that newcomers to California will enjoy a standard of living comparable to that which they enjoyed in their state of prior residence. Therefore, plaintiffs cannot argue that the failure of California to supply newcomers with any certain standard of living is a detriment to them or a penalty on their right to travel.

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[6] Some of plaintiffs' supporting *amici* argue that benefit levels are not an incentive for welfare recipients to migrate. Such arguments contradict plaintiffs' statements that section 11450.03 deters them from traveling.

Plaintiffs' argument that section 11450.03 somehow impacts the objective of political unification of our country must therefore fail. In no way does California's statute deny anyone the right to settle in California, nor does it function as a means by which California selects its citizens.

The statute does not violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution because it neither impacts nor penalizes any fundamental right and because it is free from invidious discrimination against suspect classes. Thus, California need only show that its statute is rationally related to a legitimate state purpose. *Zobel v. Williams*, 457 U.S. 55, 60 (1981). This is the standard by which legislation involving the administration of public benefits is evaluated. *Dandridge*, 397 U.S. at 487.

Plaintiffs prematurely argue that the statute has no rational purpose. The issue under consideration now is solely the standard of review by which the statute should be adjudicated. However, even if relevant, plaintiffs' argument is erroneous. The purpose of the statute is to save government expenditures and to reform California's welfare system. Under a rational basis inquiry, these are adequate justifications for the statute. When implemented, the statute will save government expenditures and will function as part of state and federal welfare reform designed to eliminate economic dependency as a way of life.

Saving the public fisc is a legitimate state purpose, and is an adequate justification for a law being tested by rational basis scrutiny. As this Court stated in *Dandridge*,

397 U.S. at 487, "the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients." Plaintiffs argue that, in their opinion, the statute does not save enough money to survive a rational basis inquiry. However, plaintiffs do not state how much money the statute would have to save in order to survive such an inquiry. Nor can they. The answer to that question is a policy decision left to the discretion of the California Legislature – not to plaintiffs or the judiciary.

Regarding the reform of welfare laws to eliminate economic dependency as a way of life, that legitimate goal will rationally be advanced by the application of section 11450.03 to many persons in a number of circumstances, as suggested in petitioners' brief on the merits at pages 5-6 and 26-27. That is enough to satisfy rational basis review. As stated in *Dandridge* at page 485, "[i]f the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' " Indeed, in *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-488 (1955), this Court went even further when it stated that a law being tested by rational basis scrutiny "need not be in every respect logically consistent with its aims to be constitutional."

II

SECTION 11450.03 IS NOT SUBJECT TO A HEIGHTENED, INTERMEDIATE STANDARD OF CONSTITUTIONAL REVIEW

The brief of the United States is of little or no assistance in resolving the issues presented in this action. The question presented in California's petition and brief on the merits involves the proper standard of review by this Court. However, the brief of the United States incorrectly states the question presented as whether California's statute "impermissibly burdens an aid recipient's federal constitutional right" to travel. Thus, instead of presenting cogent arguments in favor of a certain standard of review, the United States assumes that the proper standard of review is a heightened, intermediate standard and then discusses whether or not California's statute, in its view, meets that standard. United States Brief at 28.

Any argument that a heightened, intermediate standard of review is the appropriate standard for adjudication of the constitutionality of California's statute must fail because such a standard of review has never been held to be applicable to a statute in the area of economics and social welfare involving the administration of public welfare assistance. As California has repeatedly referenced, the constitutionality of such statutes has always been adjudicated under a rational basis analysis. *Dandridge v. Williams*, 397 U.S. 471. The United States has presented no compelling argument as to why California's statute should now be subjected to any higher scrutiny.

Heightened, intermediate scrutiny has been applied by this Court to discriminatory classifications based on

sex or illegitimacy (*Clark v. Jeter*, 486 U.S. 456 (1988)), to state statutes withholding funds for the education of children of undocumented resident aliens (*Plyler v. Doe*, 457 U.S. 202 (1982)), to restrictions on commercial speech (*Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995)), and to discrimination against nonresidents prohibited by the Privileges and Immunities Clause of the United States Constitution (*Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985)). This action does not involve any of these issues. California's statute does not relate to sex or illegitimacy, the education of undocumented resident aliens or restrictions on commercial speech. It does not discriminate against nonresidents. Instead, section 11450.03 sets levels of cash aid for new California residents and is thus no different from any other statute involving the administration of public welfare assistance.

When this Court has held heightened, intermediate scrutiny to be the appropriate standard of review, it has usually done so because the people affected by the statutes under review have certain immutable characteristics. For example, children of undocumented resident aliens have no control over their status. However, newcomers have made a conscious decision to move to California. They therefore *do* have control over their status as newcomers affected by section 11450.03.

The United States has offered no persuasive reason why a heightened form of scrutiny should be used. The argument of the United States appears to assume that some form of heightened scrutiny is appropriate, and formulates an argument based on justifying which level

of heightened scrutiny is appropriate, instead of explaining why any form of heightened scrutiny is *at all* appropriate. While the United States correctly states that strict scrutiny is an inappropriate standard of review (United States brief, page 28), it offers no explanation why rational basis review might be inappropriate, or why a heightened, intermediate standard of review might be more appropriate than a rational basis standard of review. To the extent the United States does make such an argument, the argument appears to be that because PWRORA delegates to the United States substantial authority to implement an overall federal program in state-specific ways, any implementing state action should be adjudicated under a level of heightened intermediate scrutiny.

However, such an argument is circular and makes little sense in the context of section 11450.03. If the only reason for heightened scrutiny of section 11450.03 is the existence of federal authorization, then the argument of the United States presents this Court with a real anomaly. The United States acknowledges that strict scrutiny is an inappropriate standard of review because any burden imposed by the statute is not sufficient to constitute a penalty on the right to travel. The argument of the United States must therefore be that section 11450.03, *in the absence of federal authorization*, should be scrutinized under a rational basis analysis. Thus, following the argument of the United States, federal authorization for California's statute would result in a higher standard of review than would be appropriate than if such federal authorization were not in existence. Surely, it makes no

sense to argue that federal authorization for a state statute results in a higher level of scrutiny than would result in the absence of such authorization.

The United States further argues that "the premise for applying less-than-strict scrutiny in this class of cases is that Congress has specifically authorized a general type of state classification. . . . " United States Brief at 26. The United States has erred in its analysis. Contrary to the statement of the United States, the premise for not applying strict scrutiny is that California's statute does not implicate or penalize the right to travel and the premise for applying rational basis scrutiny is that California's statute involves the administration of public welfare assistance. However, if the deference argument of the United States is accorded any weight, it necessitates a finding that state enactments such as section 11450.03 which fall squarely within the terms of the federal authorization, which do not implicate or penalize any fundamental right and which involve administration of public welfare assistance, should be subjected to a form of scrutiny no more rigorous than that to which the federal authorization should be subjected. Thus, to the extent that the United States is suggesting that the constitutionality of section 11450.03 should be adjudicated in any manner other than that to which its own authorization should be subjected, that suggestion simply makes no sense.

III

PLAINTIFFS MAY NOT RELY UPON MATERIALS REGARDING PROPOSITION 165 TO SUPPORT THEIR ARGUMENTS REGARDING THE CONSTITUTIONALITY OF THE STATUTE

In order to buttress their claim that section 11450.03 is intended to actually prevent indigent people from moving to California (a purpose that does not appear in the wording of section 11450.03, nor in the legislative history of section 11450.03), plaintiffs rely on extraneous materials. Plaintiffs argue that the purpose of California's statute is analogous to other proposed legislative schemes evidenced by materials plaintiffs submitted in support of their motion for preliminary injunction. These materials deal with California Proposition 165, a voter initiative that did not become law, and California Senate Bill 366, which also was not enacted into law. These materials are irrelevant to this Court's consideration of the statute, as neither Proposition 165 nor Senate Bill 366 is a precursor of section 11450.03.[7]

The precursor of section 11450.03 is Senate Bill 485. (Petition, at 3.) Accordingly, it is inappropriate for plaintiffs to rely on their Exhibits 5 (Supplemental Excerpts of Record filed by plaintiffs with the appellate court, "SER" 49), 6 (SER51), 7 (SER64), 8 (SER67), and 9 (SER85) because those materials are not part of the legislative history of Senate Bill 485. Additionally, to the extent these

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[7] Plaintiffs rely on *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992) for the proposition that legislative history of predecessor bills are appropriately considered. However, there are no predecessor bills to section 11450.03.

materials relate to California Proposition 165, it is inappropriate to rely on these materials as that proposition was rejected by the California electorate.

Also, plaintiff's exhibits are not competent evidence. While affidavits in support of a preliminary injunction need not fit all of the requirements of affidavits in support of a motion for summary judgment, 11 C. Wright and A. Miller, *Federal Practice and Procedure, Civil,* § 2949, at 471 (1973), the materials in the referenced exhibits are not affidavits, verified pleadings, or transcribed deposition materials. The exhibits clearly are not competent evidence.

In *Flynt Distributing Co., Inc. v. Harvey,* 734 F.2d 1389, 1394 (9th Cir. 1984) the court noted that the urgency of obtaining a preliminary injunction necessitates a prompt determination and makes it difficult to obtain affidavits from persons who would be competent to testify at trial. The court held that the trial court may give even inadmissible evidence some weight when to do so serves the purpose of preventing irreparable harm before trial. However, the court in *Flynt* was dealing with a prohibitory injunction, i.e., one which merely maintained the status quo, and not with a mandatory injunction such as that sought by plaintiffs in this case. Therefore, this Court should not consider the referenced exhibits because they are not properly authenticated, they are hearsay to the extent they purport to be testamentary in nature, and they clearly are not relevant.

Proposition 165, Assembly Bill 671, the Governor's Budget as analyzed by the Legislative Analyst, and Senate Bill 366 did not become, and are not now, the law of

the State of California. They are not relevant legislative history for the statute at issue here which did become law in California.

The California Supreme Court was presented with a similar situation in the case of *Delaney v. Superior Court,* 50 Cal.3d 785 (1990). There, the court was called upon to determine the electorate's intent in passing a constitutional amendment by initiative which shielded a reporter from contempt proceedings in refusing to answer questions about unpublished information. Delaney, who was seeking the information, argued that the court should look to the legislative history of California Evidence Code section 1070 to determine the intent of voters in passing the Constitutional amendment. The court responded:

> The history, however, is of no help in that regard. Article I, section 2(b) is plain on its face, and we need not – indeed, should not – search for external indicia of voters' intent. Moreover, the *legislative* history of section 1070 could, as a matter of logic, reflect only the *Legislature's* intent. That history would not provide us with any guidance as to *the voters'* subsequent intent because none of the indicia of the Legislature's possible intent (committee analysis and digest and letters from the statute's author) were before the voters.

Id. at 801 (citation omitted) (footnote omitted).

Plaintiffs' analysis is even more absurd. They rely on materials regarding a failed amendment to the California Constitution and other legislative material which did not result in final legislation, to establish the intent of the California Legislature in passing section 11450.03. The

absurdity here is even more pronounced since the ballot materials and the legislative analysis of *unpassed* bills do not reflect any legislative intent.

Finally, section 11450.03 does not require resort to any materials for an understanding of its provisions. It means exactly what it says. None of plaintiffs' materials reflect applicable legislative history.

IV

CALIFORNIA'S STATUTE DOES NOT VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE

Although neither the trial court nor the Ninth Circuit Court of Appeals addressed this issue, plaintiffs contend that the statute violates the Privileges and Immunities Clause of Article IV of the United States Constitution by substantially interfering with the right to interstate migration. Plaintiffs primarily rely on *Zobel v. Williams*, 457 U.S. 55 (1982) as authority for their position that the statute violates the Privileges and Immunities Clause. Plaintiffs misread *Zobel*, as they rely entirely on Justice O'Connor's concurring opinion, in which no other justice joined. Justice O'Connor's viewpoint is not reflected in the opinion of this Court. In *Zobel*, this Court rejected a privileges and immunities claim against an Alaska statute by which the state distributed income derived from its natural resources to the adult citizens of the state in varying amounts based on the length of each citizen's residency, stating:

> The statute does not involve the kind of discrimination which the Privileges and Immunities Clause of Art. IV was designed to prevent. The

> Clause 'was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.'

Zobel, 457 U.S. at 60 n.5, citing *Toomer v. Witsell*, 334 U.S. 385, 395 (1948).

Cases which uphold the application of the Privileges and Immunities Clause to statutes that treat persons differently on the basis of state residency, such as *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988); *Hicklin v. Orbeck*, 437 U.S. 518 (1978); *Toomer v. Witsell*, 334 U.S. 385 (1948); *Doe v. Bolton*, 410 U.S. 179 (1973); *United Building & Construction Trades Council v. Mayor*, 465 U.S. 208 (1984); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985); and *Austin v. New Hampshire*, 420 U.S. 656 (1975), all do so on the basis that an actual nonresident is involved. Cases which discuss the application of the Privileges and Immunities Clause, but do not uphold the application of it, such as *Baldwin v. Fish and Game Comm'n*, 436 U.S. 371 (1978) and *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868), also analyze the issue in terms of a distinction between residents and nonresidents. In contrast, this case involves only California residents.

A clear statement of the scope of the Privileges and Immunities Clause is found in *Toomer* in which the Court stated that the clause bars "discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States." 334 U.S. at 396.

As with the state law at issue in *Zobel*, section 11450.03 does not discriminate between residents of California and residents of other states. In order to receive

cash aid in California, a person must be a resident of California. Welfare and Institutions Code section 11105. Therefore, the Privileges and Immunities Clause has no application to this case and does not afford grounds for invalidation of the statute.

CONCLUSION

California is attempting to bring innovative solutions to a pressing national concern – welfare reform. As part of an attempt to fix a program which works for neither the federal government, the states nor for the recipients, California, along with the federal government and many other states, are experimenting with a variety of changes to this country's welfare programs. The reasonable discretion of California to improve its welfare program has been stymied by unwarranted strict scrutiny review. As with other statutes involving the administration of public benefits, the constitutionality of section 11450.03 should be analyzed under the rational basis standard. Strict scrutiny is not the proper standard to be used because the right to travel is not penalized by operation of California's statute. At most, the only impact the statute has on the right to travel is remote and incidental.

This Court should reverse the judgment of the Ninth Circuit and remand this case with instructions that the preliminary injunction be dissolved.

Dated: December 28, 1998

Respectfully submitted,

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